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NICHOLS v. UNION UNDERWEAR CO. AND THE MEANING OF "UNREASONABLY DANGEROUS": A CALL FOR A MORE PRECISE STANDARD

INTRODUCTION

Since 1966,[1] Kentucky has adhered to the doctrine of strict liability as set out in section 402A of the *Restatement (Second) of Torts,* which holds a seller liable for physical harm caused by any product sold "in a defective condition unreasonably dangerous to the user or consumer."[2] In *Nichols v. Union Underwear Co.,*[3] a product liability suit against the manufacturer-seller of a T-shirt that caught fire when the child wearing it played with matches, the trial judge instructed the jury that "[a] product is 'unreasonably dangerous' only if it is dangerous to an extent beyond that which would be contemplated by an ordinary adult purchaser thereof, with ordinary knowledge as to its inherent characteristics."[4] The instruction was based on comment i to section 402A.[5]

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[1] In Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441, 446-47 (Ky. 1966), the Kentucky Court of Appeals adopted the language of the RESTATEMENT (SECOND) OF TORTS § 402A (1965). In Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. 1973), the Court specifically applied the doctrine of strict liability to a suit for defective design of a product.

[2] The American Law Institute (ALI) offers the following definition of strict liability when a consumer is harmed by a seller's product:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[3] Nichols v. Union Underwear Co., 602 S.W.2d 429 (Ky. 1980).

[4] *Id.* at 432.

[5] "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowl-

Following these instructions, the jury denied the plaintiff recovery and the Kentucky Court of Appeals affirmed the judgment for the defendant.[6] The Kentucky Supreme Court reversed, holding that the judge had improperly defined for the jury the concept of an "unreasonably dangerous" product.[7] Thrusting itself into what has been called the most agitated and controversial question in the field of product liability,[8] the Court noted that the effect of such an instruction "is to insulate a product from liability simply because it is patently dangerous, or because it is no more dangerous than would be anticipated by the ordinary person."[9] Thus the Court rejected "patent danger" or "consumer expectation" as an absolute defense to strict liability[10] and held that, henceforth, in Kentucky, consumer knowledge may be only one of the factors used to determine whether a product is unreasonably dangerous.[11]

This comment focuses on the rejection of the comment i consumer expectation test as the sole determinant of an unreasonably dangerous product and suggests that while the *Nichols* holding moved Kentucky product liability law in a positive direction, the Court should proceed further. Adoption of a utility-risk balancing approach, whereby a manufacturer is held liable if the risk posed to the consumer by the product is outweighed by the product's benefit to the public, is advocated.

I. A WORKING BACKGROUND

A. *The Rise of the Consumer Expectation Test*[12]

Product liability was first mentioned in a 1944 California

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edge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A, comment i, at 352 (1965).

[6] Nichols v. Union Underwear Co., No. 78-CA-759-MR (Ky. Ct. App. April 13, 1979).

[7] Nichols v. Union Underwear Co., 602 S.W.2d 429, 432-33 (Ky. 1980).

[8] Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 576 (1980) [hereinafter cited as *Product "Design Defects"*].

[9] 602 S.W.2d at 432.

[10] *Id.*

[11] *Id.* at 433.

[12] For other treatments of the historical development of the law of product

case, *Escola v. Coca Cola Bottling Co.*,[13] and was first applied eighteen years later in *Greenman v. Yuba Products, Inc.*[14] In 1965, the American Law Institute (ALI) adopted the philosophy of *Greenman* in section 402A of the *Restatement (Second) of Torts*.[15] As jurisdiction after jurisdiction followed the ALI's lead in recognizing strict liability in tort for products, it became clear that the days of *caveat emptor* were over[16] and that the plaintiff's burden under the theory was simply to show that a product was defective or in a dangerous condition when it left the defendant's control.[17] The problem still remained, however, of determining how a plaintiff would show that the product was defective, or as comment g to section 402A defines it, "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[18]

The consumer expectation test articulated in comment i[19] to section 402A seemed appropriate. Strict liability in tort developed from the liability imposed for breach of an implied warranty of merchantability, a doctrine concerned with protecting justified expectations of the consumer.[20] Thus, those

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liability, see, *e.g.*, 13 A.L.R.3d 1061 n.2 (1967); *Product "Design Defects," supra* note 8, at 554.

[13] 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

[14] 377 P.2d 897 (Cal. 1962).

[15] See note 2 *supra* for the text of § 402A.

[16] *See, e.g.*, Azzarello v. Black Bros. Co., 391 A.2d 1020, 1023 (Pa. 1978). The Pennsylvania Supreme Court noted the growing importance of strict liability in tort:

> The development of a sophisticated and complex industrial society with its proliferation of new products and vast changes in the private enterprise system has inspired a change in legal philosophy from the principle of caveat emptor . . . to the view that a supplier of products should be deemed to be "the guarantor of his product's safety." . . .

Id. (citing Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903, 907 (Pa. 1974)).

[17] *See, e.g.*, Reyes v. Wyeth Labs, 498 F.2d 1264, 1272 (5th Cir. 1974); Browder v. Pettigrew, 541 S.W.2d 402 (Tenn. 1976); Birnbaum, *A Re-evaluation of the Concept of Design Defects in Products*, 29 FED'N INS. COUNSEL Q. 199, 199 (1979); Fischer, *Products Liability—the Meaning of Defect*, 39 Mo. L. REV. 339, 340 (1974); Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101, 103 (1977); *Product "Design Defects," supra* note 8, at 553.

[18] RESTATEMENT (SECOND) OF TORTS § 402A, comment g at 351 (1965).

[19] See note 5 *supra* for the language of comment i.

[20] *See, e.g.*, Fischer, *supra* note 17, at 348; Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37 (1973); Wade, *On the Nature of Strict*

courts adhering to the *Restatement's* position imposed strict liability for physical harm much as they would have imposed it under implied warranty; liability was imposed only where consumer expectation had been defeated. Contractual (as opposed to tort) defenses such as disclaimer, lack of privity and lack of notice, however, were not recognized.[21]

The consumer expectation test was approved by some commentators because it focused on what was seen as the primary issue in strict liability: the manufacturer's conduct as opposed to the dangerousness of the product itself.[22] Moreover, in some situations, the test worked remarkably well. It prevented "certain types of products — whiskey, for example — from always being regarded as unreasonably dangerous in their normal condition"[23] and barred liability in certain situations where the plaintiff could have avoided the danger, such as where the user of an obviously sharp knife cut himself.[24] Last, the approach had the advantage of predictability. The use of a single standard of defectiveness made it easier to forecast which products might be the source of liability.[25]

Tort Liability for Products, 44 MISS. L.J. 825, 833-34 (1973) [hereinafter cited as *Nature of Strict Liability*]; *Product "Design Defects," supra* note 8, at 555. *See generally* Krauskopf, *Products Liability*, 32 MO. L. REV. 459 (1967); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103-14 (1960); Reitz & Seabolt, *Warranties and Product Liability: Who Can Sue and Where?*, 46 TEMP. L.Q. 527 (1973).

[21] *See, e.g.*, Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364 (Mo. 1969); U.C.C. § 2-314(2)(c) (1952 version) (providing implied warranty of merchantability, which requires that goods be "fit for the ordinary purposes for which goods are used"); Fischer, *supra* note 17, at 348; Krauskopf, *supra* note 20, at 469; Reitz & Seabolt, *supra* note 20, at 529-30.

[22] *See* Birnbaum, *supra* note 17, at 200; Keeton, *supra* note 20, at 37; Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 299 (1977).

[23] *Product "Design Defects," supra* note 8, at 554.

[24] *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Fischer, *supra* note 17, at 340; Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 89-90 (1973); Keeton, *supra* note 20, at 34-35.

[25] *See, e.g.*, Orfield v. International Harvester Co., 535 F.2d 959 (6th Cir. 1976) (applying Tenn. law); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794 (Wis. 1975).

B. *Comment i Under Fire*

Soon after courts began to adopt the consumer expectation standard, noted commentators in the product liability field began to criticize that standard.[26] One commentator called it

> a nebulous test—a vague and a very imprecise one—because the ordinary consumer cannot be said to have expectations as to safety regarding many features of the complexly made products that are purchased, such as the risk of fire from the way gasoline tanks are designed and installed in cars or the magnitude of the risks of cars overturning and the like.[27]

Dean John Wade, Reporter of the *Second Restatement*, noted that the consumer expectation test failed because, in many situations, "the consumer would not know what to expect, because he would have no idea how safe the product could be made."[28] Some saw using the test as the sole criterion for definition of an unreasonably dangerous product as a limitation on the strict liability doctrine itself, since frustration of consumer expectations was only one of several reasons for the adoption of strict liability. Other reasons included distributing risk,[29] providing safety incentives[30] and overcoming plaintiffs' proof problems.[31] Moreover, some commentators

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[26] *See* Birnbaum, *supra* note 17, at 200; Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969); *Product Liability, supra* note 20, at 37; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); *Nature of Strict Liability, supra* note 20, at 830-34; *Product "Design Defects," supra* note 8, at 556.

[27] Keeton, *supra* note 20, at 37.

[28] *Nature of Strict Liability, supra* note 20, at 829.

[29] "[T]hose engaged in the manufacturing enterprise can serve effectively as risk distributors by accepting responsibility for accident losses attributable to the dangerousness of products as a cost of doing business." *Product Liability, supra* note 20, at 35. *See* Greenman v. Yuba Products, Inc., 377 P.2d 897, 901 (Cal. 1962); Henningson v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960); Goldberg v. Kollsman Instrument Corp., 191 N.E.2d 81 (N.Y. 1963); Fischer, *supra* note 17, at 339; *Nature of Strict Liability, supra* note 20, at 826.

[30] "Risk spreading increases costs. Competition, on the other hand, forces the manufacturer to keep costs down. This provides an incentive to develop safer products." Fischer, *supra* note 17, at 340. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944); Keeton, *supra* note 20, at 34; *Nature of Strict Liability, supra* note 20, at 826.

[31] "Defective products usually result from fault, but the complexities of the mod-

perceived the test as requiring that any dangerous product be held legally acceptable as long as the ordinary consumer would not be surprised by it.[32] Thus, while the commentators did not recommend total abandonment of the comment i approach,[33] the consumer expectation test clearly had come into disfavor.

II. JUDICIAL REJECTION OF COMMENT i

As commentators found flaws in the language and viability of comment i, it was inevitable that some courts would also question its effectiveness. The California Supreme Court was one of the first courts to reject the *Restatement* standard of unreasonably dangerous in the case of a patent design defect.[34] In *Luque v. McLean,*[35] the product contained an obvi-

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ern manufacturing process make this very difficult to prove. This problem is circumvented by imposing strict liability." Fischer, *supra* note 17, at 340. *See* Keeton, *supra* note 20, at 34; *Nature of Strict Liability, supra* note 20, at 826.

[32] Darling, *The Patent Danger Rule: An Analysis and a Survey of its Vitality,* 29 MERCER L. REV. 583, 598-99 (1978); Donaher, Piehler, Twerski and Weinstein, *The Technological Expert in Products Liability Litigation,* 52 TEX. L. REV. 1303, 1304-05 (1974); Keeton, *supra* note 20, at 35. "If frustration of consumer expectations as to the nature and quality of a product were the only basis for shifting losses without fault, recovery would be limited to those harmed in damaging events attributable to risks of which consumers were unaware." *Id.*

[33] See notes 51-68 *infra* and accompanying text for alternatives to the consumer expectation test which have been offered by commentators and utilized by some courts.

[34] The California Supreme Court previously had decided in Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1155 (Cal. 1972), to move away from the *Restatement's* standard for determining a defective product. Thus, while the *Restatement* required that an actionable product be in a "defective condition unreasonably dangerous to the user or consumer," the court in *Cronin* held that a plaintiff need only prove a defective product. *See also* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Glass v. Ford Motor Co., 309 A.2d 562 (N.J. Super. 1973).

> *Cronin* was not followed elsewhere. A number of courts gave thorough and careful consideration to the problem and determined to retain the *Restatement's* unreasonably-dangerous [sic] approach—usually with some basis for translating it to the jury in terms of reasonable expectations or reasonableness in putting the product on the market in that condition, or a combination of the two.

Product "Design Defects," supra note 8, at 557.

It was not until Luque v. McLean, 501 P.2d 1163 (Cal. 1944), however, that the California Supreme Court addressed the concept of consumer expectation or the presence of a patent danger as not precluding a finding of strict liability.

[35] 501 P.2d 1163 (Cal. 1972).

ous defect, an unguarded hole in a power rotary lawn mower. The product was still found to be defective, however, because an inexpensive modification of the design could have eliminated the danger.[36] In so holding, the court harkened back to the policies underlying the adoption of strict liability, which had first been articulated in *Greenman v. Yuba Power Products, Inc.*[37] If the purpose of strict liability is to insure that the costs of injuries resulting from defective products be borne by the manufacturer rather than by the consumer,[38] the court reasoned that existence of a patent defect in the product is no reason to preclude recovery.[39]

In the wake of commentary attacking the rule, other jurisdictions followed the *Luque* approach. In rejecting consumer expectations as an absolute defense to strict liability, the Kentucky Supreme Court in *Nichols v. Union Underwear Co.*[40] noted that seventeen jurisdictions still accepted the test, while eighteen had repudiated it, and sixteen, including Kentucky, had not addressed the issue.[41] Actually, the Court had joined a larger majority than it supposed. The consumer expectations test, or patent danger rule, now appears to have been repudiated in at least twenty-two jurisdictions.[42] The

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[36] *Id.* at 1166, 1169.

[37] 377 P.2d 897 (Cal. 1962).

[38] *Id.* at 901.

[39] Luque v. McLean, 501 P.2d at 1169.

[40] 602 S.W.2d 429 (Ky. 1980).

[41] *Id.* at 432 (citing Darling, *supra* note 32, at 604-09).

[42] Alabama: Beloit Corp. v. Harrell, 339 So.2d 992 (Ala. 1976).

Alaska: Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976) (rejecting patent danger or consumer expectation as an absolute defense).

Arizona: Byrns v. Riddell, Inc., 550 P.2d 1065 (Ariz. 1976).

California: Henderson v. Harnischfeger Corp., 527 P.2d 353 (Cal. 1974); Luque v. McLean, 501 P.2d 1163 (Cal. 1972).

Colorado: Union Supply Co. v. Pust, 583 P.2d 276 (Colo. 1978). In *Pust*, the Colorado Supreme Court noted that the "open and obvious" rule apparently originated in the New York case of Campo v. Scofield, 95 N.E.2d 802 (N.Y. 1950), discussed in note 53 *infra*. The court noted further that the rule had been attacked from its inception by legal scholars and argued that application of the rule amounted to using "an assumption of the risk defense as a matter of law" in strict liability cases. The court therefore held that "[s]imply because a hazard is 'open and obvious' does not prevent it from being unreasonably dangerous to the user or consumer. Approval of the rule would be contrary to sound public policy." 583 P.2d at 284.

Connecticut: Wheeler v. Standard Tool & Mfg. Co., 359 F. Supp. 298, 302

test appears still viable in seventeen jurisdictions,[43] while the

(S.D.N.Y. 1973), *aff'd*, 497 F.2d 897 (2d Cir. 1974). As the Connecticut courts had not addressed the validity of the consumer expectation test, the federal district court looked to the law of neighboring jurisdictions, especially that of New Jersey, and treatises to determine the position the Connecticut courts would take.

Florida: Auburn Mach. Works Co., Inc. v. Jones, 366 So.2d 1167 (Fla. 1979). Florida, which had previously applied the rule, rejected it in *Jones*, wherein the Florida Supreme Court noted that the modern trend is to abandon the strict patent danger doctrine as an exception to liability. Said the court, "[t]he patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious." *Id.* at 1170. Accordingly, the court rejected the rule, concluding that it did not create an absolute exception to liability on the part of the manufacturer.

Indiana: Bemis Co. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980). Indiana previously had accepted consumer expectations as the one factor to be considered in determining whether a product was unreasonably dangerous. In *Bemis*, consumer expectations became just one of the factors to be considered. *Id.* at 56-57.

Iowa: Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970).

Kentucky: Nichols v. Union Underwear Co., 602 S.W.2d 429 (Ky. 1980).

Michigan: Krugh v. Miehle Co., 503 F.2d 121 (6th Cir. 1974). *See also* Darling, *supra* note 32, at 607 n.182.

Montana: Brown v. North Am. Mfg. Co., 576 P.2d 711 (Mont. 1978). "Defendant here advances the 'open and obvious danger' or 'patent-latent' rule as a bar to plaintiff's recovery. . . . We reject such a rule. Recent authorities in other jurisdictions that previously adopted the rule have now abolished it in persuasive, well reasoned opinions." *Id.* at 717.

New Hampshire: Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978).

New Jersey: Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965).

New York: Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. 1976). New York previously had protected manufacturers of products posing patent or obvious dangers in Campo v. Schofield, 95 N.E.2d 802 (N.Y. 1950). While some courts have viewed *Campo* as the beginning of the patent danger or consumer expectations rule (*see, e.g.*, note 43 *supra*), *Campo* actually predated the imposition of strict liability and was a negligence action. However, since the test articulated in comment i can be viewed as the ALI's adoption of the patent danger rule for strict liability cases, *Campo* cannot be ignored. In fact, when the New York court decided *Micallef*, it noted that "the time has come to depart from the patent danger rule enunciated in *Campo*." 348 N.E.2d at 573.

North Dakota: Olson v. A.W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977).

Oklahoma: Hood v. Formatron Corp., 488 P.2d 1281 (Okla. 1971) (age of the injured party affects the applicability of the latent-patent defect instruction).

Oregon: Phillips v. Kimwood Mach. Co., 525 P.2d 1033 (Or. 1974).

Pennsylvania: Azzarello v. Black Bros. Co., 391 A.2d 1020 (Pa. 1978).

Texas: Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975).

Washington: Seattle-First Nat'l Bank v. Tabert, 542 P.2d 774 (Wash. 1975).

West Virginia: Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979).

[43] Georgia: Poppell v. Waters, 190 S.E.2d 815 (Ga. 1972).

Illinois: Weiss v. Rockwell Mfg. Co., 293 N.E.2d 375 (Ill. App. 1973).

issue apparently has not yet been addressed in twelve jurisdictions.[44]

Thus, the Kentucky Supreme Court joined a growing plu-

Kansas: Hartman v. Miller Hydro Co., 499 F.2d 191 (10th Cir. 1974).

Louisiana: Tri-State Ins. Co. v. Fidelity & Cas. Ins. Co., 364 So.2d 657 (La. Ct. App. 1978).

Maryland: Volkswagen of America, Inc. v. Young, 321 A.2d 737 (Md. 1974).

Minnesota: Halvorson v. American Hoist & Derrick Co., 240 N.W.2d 303 (Minn. 1976).

Mississippi: Harrist v. Spencer-Harris Tool Co., 140 So.2d 558 (Miss. 1962).

Missouri: Stevens v. Durbin-Durco, Inc. 377 S.W.2d 343 (Mo. 1964).

Nebraska: Waegli v. Caterpillar Tractor Co., 251 N.W.2d 370 (Neb. 1977).

Nevada: Outboard Marine Corp. v. Schupbach, 561 P.2d 370 (Nev. 1977).

New Mexico: Skyhook Corp. v. Jasper, 560 P.2d 934 (N.M. 1977).

North Carolina: Douglas v. W.C. Mallison & Son, 144 S.E.2d 138 (N.C. 1965).

Ohio: Burkhard v. Short, 275 N.E.2d 632 (Ohio 1971).

Utah: Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).

Virginia: Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957).

Wisconsin: Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 230 N.W.2d 794 (Wis. 1975), is most frequently cited for the proposition that Wisconsin accepts the consumer expectation or patent danger test. It must be noted, however, that in a 1975 case the Seventh Circuit, applying Wisconsin law, refused to allow the presence of a patent danger as an absolute bar to recovery:

> [T]he more recent trend of the cases . . . opts instead in favor of an approach which reflects an effort to "discourage" misdesign rather than encouraging it in its obvious form . . . . [N]o distinction should be made between products whose dangers are obvious or latent to the user in order to discourage misdesign even in its obvious form . . . .
>
> . . . [W]e are of the opinion that the question of whether a danger is open and obvious to a user of a particular instrumentality is not a matter which should be determined in a vacuum. Rather, the unique facts of each case should bear on the question, and this, in our opinion, includes the status, intelligence, and more importantly, the training of the particular user involved.

Collins v. Ridge Tool Co., 520 F.2d 591, 595-96 (7th Cir. 1975), *cert. denied*, 424 U.S. 949 (1976).

Wyoming: Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516 (Wyo. 1964).

[44] Idaho: Mico Mobile Sales & Leasing, Inc. v. Skyline Corp., 546 P.2d 54 (Idaho 1975).

Massachusetts: Carlson v. American Safety Equip. Corp., 528 F.2d 384 (1st Cir. 1976).

South Carolina: Sanders v. Western Auto Supply Co., 183 S.E.2d 321 (S.C. 1971).

Tennessee: Orfield v. International Harvester Co., 535 F.2d 959 (6th Cir. 1976) (applying Tennessee law).

Vermont: Menard v. Newhall, 373 A.2d 505 (Vt. 1977). In addition to the above states, other jurisdictions which apparently have not ruled on the consumer expectation test are Arkansas, Delaware, the District of Columbia, Hawaii, Maine, Rhode Island and South Dakota.

rality of jurisdictions that have decided that consumer knowledge is not the only factor a jury should consider in determining whether a product is unreasonably dangerous.[45]

III. ALTERNATIVES TO COMMENT i

A. *The Void Left by Nichols*

Although it rejected a jury instruction based solely on the language of comment i, the Kentucky Supreme Court, in *Nichols v. Union Underwear Co.*,[46] declined to set out an exclusive list of other factors that could be utilized by a jury in a products liability case.[47] Instead, it held that the facts of each particular case should determine which factors are relevant.[48] Therefore, while the court provided a proper jury instruction for a new trial on the *Nichols* facts, it failed to provide guidelines for other products liability actions.[49] Thus, as the concurring opinion declared the majority opinion left Kentucky

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[45] Moreover, in analyzing the significance of those jurisdictions which have retained the consumer expectation test, one commentator noted that most of the decisions repudiating the rule or test had been made since 1970 and warned:

> (1) many of the cases which apply the rule are older cases by product liability standards;
>
> (2) a later decision can easily distinguish a case which appears to apply the rule on the basis that patency had been a deciding element on the particular facts, but had not laid down a *per se* rule that patent dangers were not actionable;
>
> (3) a decision based on § 402A can easily distinguish an earlier case which applied the patent danger rule on the basis that it was a negligence action; and
>
> (4) many of the decisions which applied the rule were handed down prior to the outpouring of commentary attacking the rule.

Darling, *supra* note 32, at 606.

[46] 602 S.W.2d 429 (Ky. 1980).

[47] *Id.* at 433. In Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. 1973), the Court had discussed deviation from industry standards as a factor, and in Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976), it had recognized the obviousness of the danger and the presence of a warning as relevant.

[48] 602 S.W.2d at 433.

[49] The Court held that in the event of another trial, the jury should be instructed:

> You will find for the plaintiff only if you are satisfied from the evidence that the material of which the T-shirt was made created such a risk of its being accidentally set on fire by a child wearing it that an ordinarily prudent company engaged in the manufacture of clothing, being fully aware of

products liability law unnecessarily vague.[50]

B. *The Model Uniform Product Liability Act*

In *Nichols*, the Court called to the state legislature's attention the Model Uniform Product Liability Act (MUPLA); the Act is an effort by the United States Department of Commerce to achieve more uniformity in product liability law.[51] MUPLA, which has been championed by commentators,[52] lists five factors to be taken into account by a jury in a design defect case such as *Nichols*:

(1) The likelihood at the time of manufacture that the product would cause the harm suffered by the claimant;
(2) The seriousness of harm;
(3) The technological feasibility of manufacturing a prod-

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the risk, would not have put it on the market; otherwise, you will find for the defendant.

Id.

[50] *Id.* at 434 (Lukowsky, J., concurring).

[51] The Court commented:

It seems to us that the entire field of product liability law is especially fertile for comprehensive legislative review and action. Its rows need to be stably defined by legislative survey of the socio-economic policies which determine its contours. Additionally, uniformity of law among all the states may be desirable because product liability insurance rates are set on a country-wide basis. Thus, the current system of having individual state courts develop product liability law on a case-to-case basis is not consistent with commercial necessity. Uniformity and stability in this area are desirable if product liability insurance rates are to be stabilized at reasonable levels.

Id. at 432 n.1.

[52] *See, e.g., Product "Design Defects," supra* note 8, at 576. Dean Wade explained the need for the Act:

Not only does the common law of products liability need to be fair and evenhanded to all classes of persons, it also needs to be as nearly uniform as possible. Products are marketed nationwide, and uniform treatment is highly desirable. Much of the commercial law in this country has been reduced to a uniform commercial code, adopted throughout the United States. The Uniform Law Commissioners have not undertaken to prepare a uniform products liability act, but the United States Department of Commerce has labored long and carefully to prepare a Model Uniform Product Liability Act, which it recommends for adoption by the states. It may be that some time in the future this Act will attain widespread adoption. In the meantime, its provisions may well prove very helpful to the state courts as they proceed with their responsibility of molding and adapting the common law of products liability.

Id.

uct designed so as to have prevented claimant's harm;
(4) The relative costs of producing, distributing, and selling such an alternative design; and
(5) The new or additional harms that may result from such an alternative design.[53]

Despite a need for a uniform law in the field of product liability, given the void created by *Nichols*, there is no guarantee that the Kentucky General Assembly will follow the Kentucky Supreme Court's gentle nudging and adopt MUPLA. In the absence of legislative action or specific judicial guidance, however, Kentucky judges are without a standard definition for "unreasonably dangerous."

C. *The Utility-Risk Balancing Test*

1. *The Wade/Keeton Approach*

As a result of the criticism of the consumer expectation standard for an unreasonably dangerous product, various alternatives have been offered. Dean Wade proposed that the jury be asked to determine "whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting it out in this fashion."[54] Under Wade's approach, the jury would consider and weigh the following factors:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
(3) The availability of a substitute product which would meet the same need and not be as unsafe.
(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
(5) The user's ability to avoid danger by the exercise of care in the use of the product.
(6) The user's anticipated awareness of the dangers inher-

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[53] 44 Fed. Reg. 2996, 2998 (1979).
[54] *Nature of Strict Liability*, *supra* note 20, at 835.

> ent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[55]

Wade cautioned that not every factor will be appropriate in each lawsuit but recognized that where a factor is significant, a jury should be so informed.[56]

Dean Page Keeton also called for a balancing test:

> A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger *as it proved to be at the time of the trial* outweighed the benefits of the way the product was designed and marketed. Under the heading of benefits one would include anything that gives utility of some kind to the product; one would also include the infeasibility and additional cost of making a safer product.[57]

In applying the utility-risk balancing test, a court would consider *all* of the policies underlying strict liability—risk spreading, safety incentives, frustration of consumer expectations and proof problems.[58] Thus, while this test goes beyond the

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[55] *Id.* at 837-38.

[56] *Id.* at 840.

[57] Keeton, *supra* note 20, at 37-38 (emphasis in original).

[58] Professor Fischer suggests the following approach:

In deciding when to impose strict liability, courts should consider, in light of the facts of the particular case, the merits of the policies underlying strict liability and balance these considerations against countervailing factors. Some of the factors that should be considered are as follows:

I. Risk Spreading
  A. From the point of view of the consumer.
    1. Ability of consumer to bear loss.
    2. Feasibility and effectiveness of self-protective measures.
      a. Knowledge of risk.
      b. Ability to control danger.
      c. Feasibility of deciding against use of product.
  B. From point of view of manufacturer.
    1. Knowledge of risk.
    2. Accuracy of prediction of losses.
    3. Size of losses.

position taken by the majority in *Nichols*, it is consistent with the holding in that case because the *Nichols* Court did not reject any of the specific factors that have been suggested for use in a utility-risk balancing test.

2. *The Concurring Opinion in* Nichols

Although the majority in *Nichols* failed to specify an appropriate test, Justice Lukowsky, in a concurring opinion, recited the Wade/Keeton formula almost verbatim and concluded that "whether a design is unreasonably dangerous must be determined by a social utility standard—risk versus benefit."[59] Indeed, since the majority opinion clearly supports consideration of more than mere consumer expectation and does not eliminate any particular factors from consideration, the inference exists that the Court may yet adopt the utility-risk balancing test. Just as it waited until a majority of jurisdictions rejected the patent danger or consumer expectation test before rejecting it as the test for Kentucky juries to em-

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4. Availability of insurance.
5. Ability of manufacturer to self-insure.
6. Effect of increased prices on industry.
7. Public necessity for the product.
8. Deterrent effect on the development of new products.

II. Safety Incentives
A. Likelihood of future product improvement.
B. Existence of additional precautions that can presently be taken.
C. Availability of safer substitutes.

Fischer, *supra* note 17, at 359.

[59] 602 S.W.2d at 434 (Lukowsky, J., concurring). Justice Lukowsky wrote:

> The bottom line is that the trier of fact is required to balance two pairs of factors existing at the time of manufacture: (1) the likelihood that the product would cause the claimants harm or similar harms, and the seriousness of those harms; against (2) the manufacturer's burden of designing a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product . . . .
>
> In the event of another trial, I believe the jury should be instructed as follows:
>
> > You will find for the plaintiff if you are satisfied from the evidence that at the time of the manufacture of the cotton and polyester T-shirt the risk of harm from its being accidentally set on fire while being worn by a child outweighed the benefit to the public from its availability in the marketplace. Otherwise, you will find for the defendant.

Id.

ploy, the Court may be waiting for broad acceptance of the Wade/Keeton formula before adopting it.

3. *The Balancing Test in Operation*

Some courts have already adopted a utility-risk standard. In *Barker v. Lull Engineering Co.*,[60] the California Supreme Court noted that it had previously rejected the "unreasonably dangerous" terminology of the *Restatement* because that standard allowed a defendant to avoid "liability so long as the product did not fall below the ordinary consumer's expectations as to the product's safety."[61] The court, however, viewed the *Restatement* as flawed only because it treated consumer expectations as a "ceiling" on a manufacturer's responsibility under strict liability rather than as a "floor."[62] Therefore, it adopted a two-pronged definition of design defect:

> [A] court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[63]

The relevant factors to be considered by a jury under the *Barker* approach would include the "gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."[64] In other words, the jury would apply a utility-risk test.

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[60] 573 P.2d 443 (Cal. 1978) (action involving an alleged design defect in a highlift loader). Barker was followed by the Alaska Supreme Court in Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 884-87 (Alaska 1979).

[61] 573 P.2d at 451.

[62] *Id.* at n.7.

[63] *Id.* at 452.

[64] *Id.* at 455.

The Texas Supreme Court in *Turner v. General Motors Corp.*[65] faced a situation similar to that faced by the Kentucky Supreme Court in *Nichols*. Texas had earlier adopted the *Restatement* approach that, to be actionable, a product had to be unreasonably dangerous; this concept was explained to the jury by a bifurcated test of whether it (1) would meet the reasonable expectations of the ordinary consumer as to its safety, or (2) be placed on the market by a prudent manufacturer who was aware of the danger involved in its alleged defect. On appeal, the court agreed with the intermediate court that the jury instruction was in error[66] but, as did the Kentucky Court, refused to hold that a jury should be specifically instructed on any given set of factors.[67] However, the Texas court did hold that a defectively designed product means "a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use."[68] Although the Texas Supreme Court failed to require that the jury should be instructed on specific factors, it nonetheless adopted the language espoused by Wade and Keeton.

CONCLUSION

With *Nichols v. Union Underwear Co.*, Kentucky became one of a growing number of jurisdictions to reject the consumer expectation test and its harsh effects on the possibilities for recovery. Because even the reporter for the *Restatement* has criticized the consumer expectation test, the Kentucky Supreme Court stood on solid legal ground when it abandoned comment i as a basis for a jury instruction in a design defect case. Yet the Court could better serve the needs of trial judges by adopting the utility-risk approach advocated

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[65] 584 S.W.2d 844 (Tex. 1979) (involving the defective design of a car roof that caved in as the car rolled over).

[66] *Id.* at 851. The court's conclusion resulted from "inclusiveness of the idea that jurors would know what ordinary consumers would expect in the consumption or use of a product, or that jurors would or could apply any standard or test outside that of their own experiences and expectations." *Id.*

[67] *Id.* at 847-48.

[68] *Id.* at 847 n.1.

by Deans Wade and Keeton and by Justice Lukowsky in his concurring opinion in *Nichols*. Had it done so, the Court would have provided guidelines to trial judges who will preside over product liability cases factually different from *Nichols*. Instead, as the field of product liability now stands in Kentucky, trial judges who determine which factors are considered by juries in such cases cannot know with any degree of certainty whether they have correctly instructed their juries. The Kentucky Supreme Court should eliminate that uncertainty and follow the lead of other jurisdictions by holding that, considering all relevant factors, a manufacturer is liable if the risk inherent in his product outweighs its utility to the public.

Elsa Goss Black